JOHAN PROPERTIES SDN BHD A

v.

LEE YIN CHUAN & ORS

COURT OF APPEAL, PUTRAJAYA B
ZAINUN ALI JCA
ABDUL WAHAB PATAIL JCA
CLEMENT SKINNER JCA
[CIVIL APPEAL NO: W-02-587-2003]
11 JANUARY 2011 C

CONTRACT: *Breach - Building contract - Sale and transfer of land - Defendant's failure to comply with the request of plaintiff for delivery of vacant possession of land - Whether there was wrongful repudiation or breach of agreement - Whether plaintiff failed to furnish performance bond within reasonable time - Whether learned judge erred in his findings* D

The five defendants were beneficial owners of a piece of land ('the said land'). On 23 June 1983, they sold the said land to Johan Holdings Berhad ("Johan") for RM9.5 million ('the "Principal Agreement") of which 1.7 million was paid as a deposit. On 31 December 1991, the parties entered into another agreement (the "New Agreement"). The New Agreement was conditional upon and shall come into effect upon Johan delivering to the defendants ('the effective date') a performance bond (the performance bond) for a sum of RM9.5 million. On the effective date *ie*, upon Johan delivering the performance bond, the defendants agreed to deliver to Messrs PM Tan, Chan and Partners the duly executed and registrable memorandum of transfer of the property and deliver vacant possession of the property. By their letter dated 21 March 1996, the plaintiff delivered a performance bond dated 15 March 1996 to the defendants. The plaintiff requested for delivery from the defendants the duly executed and registrable memorandum of transfer of the said land in favour of the plaintiff, a certified court order approving the sale and transfer of the said land to the plaintiff and vacant possession of the said land. The defendants did not comply with the request of the plaintiff. Subsequently, the plaintiff commenced this suit claiming general damages and special damages arising from the wrongful repudiation or alternatively breach of the New Agreement by the defendants. The defendants denied liability on the basis that since the plaintiff had failed to furnish the E F G H I

A performance bond within a reasonable time, they were released from performing any of their obligations under the New Agreement. At the conclusion of the trial, the learned judge dismissed the plaintiff's claim. The learned judge held, *inter alia*, that the time taken by the plaintiff of more than four years to
B deliver the performance bond was unreasonable - consequently the plaintiff was in breach of the New Agreement thereby entitling the defendants to treat the contract as having been rescinded. The plaintiff appealed.

C **Held (allowing the appeal)**
Per Clement Skinner JCA delivering the judgment of the court:

(1) While an appellate court would be slow in interfering with findings of fact arrived at by a trial court, appellate
D intervention was warranted in this case as the learned judge had failed to consider certain crucial and relevant evidence in coming to his finding that the defendants were entitled to treat the contract as having been rescinded. (paras 14 & 16)

E **(2)** In the plaintiff's solicitor's first letter which was written before the end of the four years period, the plaintiff had indicated that they were at that point in time ready to deliver the performance bond and in turn requested the defendants to deliver the duly executed memorandum of transfer, certified
F copy of the court order approving the sale and transfer of the said land and for vacant possession. Evidence showed that the defendants had elected to affirm the contract because in the plaintiff's solicitor's second letter, the first defendant had agreed to deliver the documents referred to in the plaintiff's
G solicitor's first letter. The learned judge had failed to consider whether the defendants had elected to affirm the contract. If he had done so, he would have found that the contents of undisputed contemporaneous documents in the form of those two letters dated 25 May 1995 and 12 July 1995 had
H established that the defendants had elected to affirm the contract. (paras 18 & 20)

(3) The learned judge should have found that since the defendants had elected to affirm the contract, it was
I reasonable and permissible for the plaintiff to deliver the bond when it did and that the time for delivery had not passed or lapsed as contended by the defendants. The learned judge

should have found that when the defendant did not deliver to the plaintiff the documents they had agreed to deliver in exchange for the performance bond, they were in breach of the New Agreement. (para 23)

Bahasa Malaysia *Translation Of Headnotes*

Kelima-lima defendan adalah pemilik-pemilik benefisial sebidang tanah ('tanah tersebut'). Pada 23 Jun 1983, mereka telah menjual tanah tersebut kepada Johan Holdings Berhad ('Johan') untuk RM9.5 juta ('perjanjian utama') di mana 1.7 juta telah dibayar sebagai deposit. Pada 31 Disember 1991, pihak-pihak telah memasuki perjanjian lain ('Perjanjian Baru'). Perjanjian Baru adalah bersyarat dan akan dikuatkuasakan apabila Johan menyerahkan kepada defendan-defendan ('tarikh kuatkuasa') bon pelaksanaan ('bon pelaksanaan') bagi bayaran RM9.5 juta. Pada tarikh kuatkuasa, iaitu apabila Johan menyerahkan bon pelaksanaan, defendan-defendan bersetuju untuk menyerahkan kepada Messrs PM Tan, Chan and Partners memorandum pemindahan tanah yang telah dimeterai dengan teratur dan boleh didaftarkan dan menyerahkan milikan kosong hartanah. Melalui surat mereka bertarikh 21 Mac 1996, plaintif menyerahkan bon pelaksanaan bertarikh 15 Mac 1996 kepada defendan-defendan. Plaintif meminta penyerahan dari defendan-defendan memorandum pemindahan tanah yang telah dimeterai dan boleh didaftarkan tanah tersebut bagi pihak plaintif, satu perintah mahkamah diperakui membenarkan jualan dan pindahmilik tanah tersebut kepada plaintif dan milikan kosong hartanah. Defendan-defendan tidak memenuhi permintaan plaintif. Seterusnya, plaintif memulakan guaman ini untuk menuntut gantirugi am dan gantirugi khas yang berbangkit dari penamatan salah atau secara alternatif pelanggaran Perjanjian Baru oleh defendan-defendan. Defendan-defendan tidak mengaku liabiliti atas dasar oleh kerana plaintif telah gagal memberikan bon pelaksanaan dalam masa yang munasabah, defendan-defendan dilepaskan dari melaksanakan apa-apa obligasi di bawah Perjanjian Baru. Pada akhir perbicaraan, yang arif hakim menolak tuntutan plaintif. Yang arif hakim memutuskan, antara lain, bahawa masa yang diambil oleh plaintif yang melebihi empat tahun untuk menyerahkan bon pelaksanaan adalah tidak munasabah - oleh itu plaintif telah melanggar Perjanjian Baru dengan itu memberi hak kepada defendan-defendan untuk menganggapkan kontrak sebagai dibatalkan. Perayu membuat rayuan.

Diputuskan (membenarkan rayuan)
Oleh Clement Skinner HMR menyampaikan penghakiman mahkamah:

(1) Walaupun mahkamah rayuan selalunya lambat dalam mengganggu penemuan fakta oleh hakim bicara, campurtangan rayuan diperlukan di dalam kes ini kerana yang arif hakim telah gagal mempertimbangkan keterangan yang penting dan relevan apabila membuat penemuan bahawa defendan-defendan berhak untuk menganggap kontrak sebagai dibatalkan.

(2) Di dalam surat pertama peguamcara plaintif yang ditulis sebelum akhirnya tempoh empat tahun, plaintif telah memberi indikasi bahawa pada masa itu mereka sudah bersedia untuk menyerahkan bon pelaksanaan dan dengan itu telah meminta defendan-defendan menyerahkan memorandum pemindahan tanah yang telah dimeterai, satu perintah mahkamah diperakui membenarkan jualan dan pindahmilik tanah tersebut dan milikan kosong hartanah. Keterangan menunjukkan bahawa defendan-defendan telah melantik untuk mengesahkan kontrak sebab di dalam surat kedua peguamcara plaintif, defendan pertama telah bersetuju untuk menyerahkan dokumen-dokumen yang dirujuk di dalam surat pertama peguamcara plaintif. Yang arif hakim telah gagal mempertimbangkan sama ada defendan-defendan telah melantik untuk mengesahkan kontrak. Jika yang arif hakim telah bertindak sedemikian, beliau akan mendapati bahawa kandungan dokumen-dokumen semasa yang tidak dapat dipertikaikan dalam bentuk surat-surat bertarikh 25 Mei 1995 dan 12 Julai 1995 telah membuktikan bahawa defendan-defendan telah melantik untuk mengesahkan kontrak.

(3) Yang arif hakim sepatutnya mendapati bahawa oleh kerana defendan-defendan telah melantik untuk mengesahkan kontrak, ia adalah munasabah dan dibenarkan untuk plaintif menyerahkan bon pada masa plaintif berbuat demikian dan masa untuk penyerahan tidak luput seperti yang dihujah oleh defendan-defendan. Yang arif hakim sepatutnya mendapati bahawa apabila defendan-defendan tidak menyerahkan kepada plaintif dokumen-dokumen yang mereka telah bersetuju untuk menyerahkan sebagai pertukaran dengan bon pelaksanaan, mereka telah melanggar Perjanjian Baru.

Case(s) referred to:

Macon Works & Trading Sdn Bhd v. Phang Hon Chin & Anor [1975] 1 LNS 93 HC ***(refd)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 47

For the appellant - Rishwant Singh; M/s Zul Rafique & Partners
For the respondent - Joseph Yeo; M/s Joseph Yeo

[Appeal from High Court, Kuala Lumpur; Suit No: S3-22-383-96]

Reported by Suhainah Wahiduddin

JUDGMENT

Clement Skinner JCA:

[1] On 21 July 2010 we allowed the appellant's (plaintiff's) appeal. These are our reasons for doing so.

[2] The parties agreed that the only issue for trial in the High Court was:

> Whatever in all the circumstances of this case, it was reasonable and permissible for the plaintiff to deliver the (performance) bond when it did or whether as is contended by the defendant the time for delivery has passed and the New Agreement has lapsed.

[3] The issue arose in the following circumstances. The five defendants are the beneficial owners of a piece of land ("the said land"). On 23 June 1983 they sold the said land to Johan Holdings Berhad ("Johan") for RM9.6 million (the "principal agreement") of which RM1.7 million was paid as a deposit. The sale was to be completed within three months of the date of approval from the Foreign Investment Committee, Malaysia of the transaction.

[4] By a supplemental agreement dated 23 June 1983 (the "1st supplemental agreement") the parties agreed to extend the completion date to 6 1/2 years from 23 June 1983.

[5] By a further agreement entered into in 1983 ("the 2nd supplement agreement") the exact date of which is not stated, the parties agreed that *in lieu* of the balance of the purchase price the defendants would accept: (a) suitable area of 24,000 sq ft in a proposed office building to be built on the said land; and (b) a certain number of shares in a Car Park Company incorporated for that purpose.

[6] On 30 December 1991 the parties entered into another agreement (the "new agreement"), the essential terms of which were:

(i) The new agreement embodies all the terms and conditions agreed between the parties and supersedes and cancels all previous agreements;

(ii) The new agreement is conditional upon and shall come into effect upon Johan delivering to the defendants (the "effective date") a Performance Bond (the performance bond) for a sum of RM9.5 million to enable the defendants to make a demand on the performance bond in the event Johan shall fail or refuse to complete the office complex within the time provided in the new agreement;

(iii) On the effective date ie, upon Johan delivering the performance bond, the defendants agreed to:

(a) deliver to Messrs PM Tan, Chan and Partners, the duly executed and registrable memorandum of transfer of the property; and

(b) deliver vacant possession of the property.

[7] By a deed of novation dated 30 December 1991, all rights and obligations of Johan in the new agreement were novated to the plaintiff.

[8] By their letter dated 21 March 1996 the plaintiff's solicitors, delivered a performance bond dated 15 March 1996 issued by Arab Malaysia Merchant Bank to the defendants' solicitors. In their letter, the plaintiff's solicitors requested for delivery from the defendants of the following within seven days:

(a) the duly executed and registrable memorandum of transfer of the said land in favour of the plaintiff together with the relevant stamping proforma;

(b) a certified court order approving the sale and transfer of the said land to the plaintiff or its nominee (as the said land formed part of the assets of the estate of the defendants' late father Lee Yow Cheng). A

(c) vacant possession of the said land. B

[9] The defendants did not comply with the request of the plaintiff's solicitors. On 25 July 1996 the plaintiff commenced this suit claiming general damages and special damages arising from the wrongful repudiation or alternatively breach of the new agreement by the defendants. The defendants denied liability on the basis that since the plaintiff had failed to furnish the performance bond within a reasonable time, they were released from performing any of their obligations under the new agreement. The defendants in turn filed a counterclaim for damages against the plaintiff for the latter's breach of the new agreement. On 5 September 1996 ie, some six months after this suit commenced, the defendants returned the performance bond to the plaintiff. C D

[10] At the commencement of the trial the parties agreed that the trial was only to determine liability. Damages were to be assessed if liability was established. At the conclusion of the trial the learned Judge dismissed the plaintiff's claim and the defendants' counterclaim as well. The plaintiff's appeal is against that part only of the decision which dismisses its claim. The defendants did not appeal against the dismissal of their counterclaim. E F

[11] In deciding the issue before him, the learned judge recognized, as did the parties, that since cl. 2 of the new agreement did not specify any time frame within which the plaintiff was to furnish the performance bond to the defendants, the provisions of s. 47 of the Contracts Act 1950 applied to the facts of this case. That section states that where by the contract made, no time for performance is specified, the promisor must perform his promise "within a reasonable time". G

[12] In deciding what was reasonable time in this case the learned judge followed the decision of Hashim Yeop A Sani J (as he then was) in *Macon Works & Trading Sdn Bhd v. Phang Hon Chin & Anor* [1975] 1 LNS 93 where it was held that the question of what is reasonable time is a question of fact and depends in each case on the circumstances which actually exists and consequently, the court can take into account the conduct of the parties in deciding that question. H I

[13] On the evidence before him, the learned judge came to the following findings:

(i) When the plaintiff's solicitors delivered the performance bond to the defendant on 21 March 1996, some four years three months had lapsed from the date of the new agreement;

(ii) The plaintiff's explanation (given through its witness Chew Fook Yew (PW1)) that the delay of four years was caused by the time taken for its consultants, architects, quantity surveyors, consultant engineers, property consultants and financiers to put things in order before the development could proceed, was rejected by the learned judge as no evidence was adduced about what steps the plaintiff or the consultants had taken which took four years, bearing in mind that those works would already have started or completed during that time or under the previous agreements;

(iii) That the time taken by the plaintiff of more than 4 years to deliver the performance bond was unreasonable - consequently the plaintiff was in breach of the New Agreement thereby entitling the defendants to treat the contract as having been rescinded;

(iv) There was no obligation on the part of the defendants to make a demand on the plaintiff to deliver the performance bond nor to give reasonable notice to the plaintiff making time the essence of the contract;

(v) Subsequent to the termination of the contract the 1st defendant commenced negotiations with Mr Lau Eng Shin (the manager of the property division of Johan) for an outright sale of the said land;

(vi) It was only after the failure of the negotiations for the sale that the plaintiff tendered the performance bond to the defendants;

(vii) The defendant did not give any notice of termination of the contract to the plaintiff (see bottom of p. 32 and top of p. 35 Record of Appeal).

[14] While an appellate court would be slow in interfering with findings of fact arrived at by a trial court, appellate intervention is warranted in this case as the learned judge had failed to consider certain crucial and relevant evidence in coming to his finding that the defendants were entitled to treat the contract as having been rescinded. We say so for the following reasons. A B

[15] The plaintiff's obligation to furnish the performance bond was a fundamental term which went to the root of the contract, a breach of which would entitle the innocent party to rescind the contract. The learned judge recognized the fundamental nature of the plaintiff's obligation when he said that until and unless the plaintiff furnished the performance bond, the new agreement remains conditional with the plaintiff not being obliged to take any steps to develop the said land or to incur any liability thereunder. C D

[16] The learned judge found that the plaintiff was in breach of this fundamental term as four years was not a reasonable time within which to deliver the performance bond. The position in law which the defendants occupied on 21 March 1996 when the plaintiff offered to perform the contract by delivering the performance bond to the defendants in exchange for the documents mentioned, was that of an innocent party. In *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 the Federal Court explained the rights of an innocent party to rescind a contract in these terms (per Gopal Sri Ram FCJ at pp. 280-281: E F

> At the heart of this appeal lies the question: what are the rights of an innocent party where there is a breach of contract?
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> …
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> The doctrine of repudiation is based on the proposition that where a promisor wrongfully repudiates a contract in its entirety, the promisee has a choice. He or she may elect to accept the repudiation, treat the contract as at an end and sue for damages. The rationale is that the primary obligation to perform the promise made is substituted with a secondary obligation to compensate the promisee for the breach. See *Moschie v. Lep Air Services Ltd & Anor* [1973] AC 331. Alternatively, he or she may elect to reject the repudiation and treat the contract as subsisting. Whether the one or the other course was adopted by the promisee - the innocent party - is a fact that is to be inferred by the court from the objective facts, including the words and conduct of the parties. An election once made is irreversible. See *Sargent v. ASL Developments Ltd* [1973] 131 CLR 634 AT P 655.

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A **[17]** Although the learned judge had found that the plaintiff was in breach of the new agreement because of the four year delay, the matter did not end there. In our judgment the delay amounted to a repudiatory breach entitling the defendants as the innocent party to exercise one of two alternative rights, namely, (a) to elect B to accept the repudiation, treat the contract as at an end and sue for damages or (b) to elect to reject the repudiation, affirm the contract and hold the plaintiff to its promise.

[18] The learned judge said in his grounds of judgment that the C defendants never terminated the contract. This conduct of the defendants must mean that they did not elect to accept the plaintiff's repudiatory breach. Quite apart from that, the learned Judge also failed to consider at all whether the defendants had elected to affirm the contract. If he had done so he would have D found that the contents of undisputed contemporaneous documents in the form of two letters written by the plaintiff's solicitors on 25 May 1995 and 12 July 1995 establish that the defendants had elected to affirm the contract. In the plaintiff's solicitor's first letter which was written before the end of the four E years period, the plaintiff indicated they were at that point in time ready to deliver the performance bond and in turn requested the defendants to deliver the duly executed memorandum of transfer, certified copy of the court order approving the sale and transfer of the said land and for vacant possession.

F **[19]** Since the plaintiff's solicitor's first letter was written some three years five months after the new agreement, the defendants' right to elect to either accept the plaintiff's repudiatory breach or to affirm the contract had arisen by then. The evidence shows that instead of the defendants informing the plaintiff that they had G accepted the plaintiff's repudiation of the contract thereby regarding the contract as at an end and they (the defendants) being released or discharged there from, the defendants elected to affirm the contract, because it is stated in the plaintiff's solicitor's second letter that Mr Lee Yin Chuan the (1st defendant) had H spoken to Mr Tan Poh Meng of the plaintiff's solicitors and had agreed to deliver the documents referred to in the plaintiff's solicitor's first letter. In fact the 1st defendant agreed to deliver those documents by 15 July 1995. The 1st defendant is a lawyer. If what was stated in the plaintiff's solicitor's second letter was I not true we would expect the 1st defendant to set the record straight. He did not do so.

[20] In our judgment if the defendants did not intend to affirm the contract then there would be no need for them to agree to deliver the documents requested by the plaintiff in exchange for the performance bond. The defendants could have simply informed the plaintiff's solicitors that they would not be delivering the documents requested as they regarded the contract as being at an end due to the plaintiff's repudiatory breach. In our judgment the defendants had by their conduct firmly and unequivocably elected to affirm the contract by 12 July 1995.

[21] The learned judge found that "subsequent to the termination 1st defendant commenced negotiations with Lau Eng Shim, the property manager of Johan Holdings, for an outright sale of the said land". This finding cannot be supported by the evidence. In the first place, the finding is inconsistent with the learned judge's own finding that the defendant never gave any notice to terminate the new agreement. In the second place, the evidence shows that in response to the plaintiff's solicitor's first letter the 1st defendant had elected to affirm the contract by agreeing to deliver the documents requested by 15 July 1995. Therefore the new agreement could not have been terminated as stated by the learned judge.

[22] The learned judge also found that the plaintiff did not call any witness to rebut the 1st defendant's testimony to the effect that he had raised the issue of the delay in furnishing the performance bond with Mr Lau Eng Shin, and that he (1st defendant) regarded the new agreement as having lapsed and the defendants were no longer interested (in the joint venture) but were prepared to sell the said land. In our judgment the learned judge erred in coming to that conclusion as he failed to consider that there was sufficient evidence already before the court which the plaintiff could rely on to show that it was only after the defendants had elected to treat the contract as subsisting that the 1st defendant later changed his mind and wanted to sell the said land outright. The evidence we refer to is:

(i) the 1st defendant's own evidence in chief where he said in response to question 18 of his witness statement:

> 18Q. Is it true that you agreed to deliver the document referred to in the letter of 25.5.1995 by 15.7.1995?
>
> (ie, the plaintiff's solicitor's first letter)

A. Yes, but the plaintiff has to comply with the terms of the New Agreement first by delivering the Performance Bond to the defendants.

By this reply the 1st defendant had not only confirmed that he had affirmed the contract, but also that despite the delay the defendants expected the plaintiff to deliver the performance bond.

(ii) That the contemporaneous documents show that it was only in about September 1995 ie, about two months after the plaintiff's solicitor's second letter and after the 1st defendant had affirmed the contract that he spoke to Mr Lau Eng Shim about selling the said land (see p. 263 Record of Appeal).

(iii) In his cross-examination (at p. 162 Record of Appeal) the 1st defendant was referred to B p. 67 ie, the plaintiff's solicitor's second letter dated 12 July 1995 in which it is clearly recorded that the 1st defendant had agreed to deliver the documents requested by 15 July 1995 (thereby affirming the contract). When questioned on this the 1st defendant testified that:

I have to receive the performance bond before complying with the request to deliver the documents. I went through the agreement and changed my mind. I did not reply to the letter. I did not think it was important to record this in writing.

This evidence shows that after the 1st defendant elected to treat the contract as still subsisting by agreeing to deliver the documents requested in exchange for the performance bond, the 1st defendant changed his mind.

(iv) Later on in his cross-examination (at p. 163 Record of Appeal) the 1st defendant confirmed that it was only after he received the performance bond in March 1996 that he told Mr Lau Eng Shim that the defendants were no longer interested in the joint venture agreement, when he said:

The performance bond was delivered in March 1996. I told Mr Lau the defendants are no longer interested in joint venture agreement. We are prepared to sell the land to the Plaintiff. I accepted the bond but did not return it.

(v) The 1st defendant's admission that he accepted the performance bond when it was sent to him and did not return it to the plaintiff until some six months after this suit commenced, is conduct consistent with the defendants having elected to affirm the contract by 12 July 1995.

The evidence we have just referred to clearly shows that after having elected to treat the contract as subsisting after receiving the plaintiff's solicitor's two letters, the 1st defendant later changed his mind on the matter. This he cannot do as an election once made is irreversible. The law will not allow a party to approbate and reprobate on a matter as the defendants have tried to do.

[23] Reverting to the issue before the court we find that the learned judge should have found that since the defendants had elected to affirm the contract, it was reasonable and permissible for the plaintiff to deliver the bond when it did and that the time for delivery had not passed or lapsed as contended by the defendants. Following on from that finding, the learned judge should have found that when the defendant did not deliver to the plaintiff the documents they had agreed to deliver in exchange for the performance bond, they were in breach of the new agreement.

[24] With regard to the finding of the learned judge that there was no need for the defendants to give reasonable notice to the plaintiff to make time of the essence in this case, it is our view that the learned judge was correct in what he said as the factual context in which the issue arose is one to which s. 47 of the Contracts Act 1950 applies. There is no dispute on this between the parties. Although we were referred to several decided cases in which it was held that reasonable notice is still required to be given before an innocent party can rescind a contract where the contract itself does not make time of the essence or where time has become at large, it is our view that each case must be decided on its own facts. Here the new agreement did not require the defendants to apply to the plaintiff to perform its promise to furnish the performance bond. Since s. 47 expressly states that in a contractual situation where "a promisor is to perform his promise without application by the promisee" and no time for performance is specified, the promise must be performed within a reasonable time, we cannot find any basis or justification for requiring the

A defendant to give a further notice to the plaintiff to make time of the essence when s. 47 already requires the promise to be performed within a reasonable time. Requiring the defendant to give reasonable notice to make time of the essence, would be tantamount to asking the defendant to do something which s. 47
B already provides for ie, that the promise must be performed within a reasonable time. This finding however has no effect on our decision in this case.

[25] We accordingly allowed the appeal with costs.

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